In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-997

JOHN MELNICK AND JUDITH MELNICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether petitioner[1] was entitled to deduct as trade or business expenses under Section 162 of the Internal Revenue Code of 1954 the costs he incurred in attending law school. Both courts below upheld the Commissioner's disallowance of petitioner's claimed deduction on the ground that they qualified him for a "new trade or business" within the meaning of Treasury Regulations, Section 1.162-5(b)(3) (26 C.F.R.).

Petitioner was employed as a revenue agent with the Internal Revenue Service. During 1969, the year at issue, he began to attend night classes at the Southwestern University Law School. He continued his

[1] "Petitioner" refers to John Melnick. His wife, Judith Melnick, is a party solely because she filed a joint return with her husband for the year in issue.

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studies and obtained a law degree in 1972. The Internal Revenue Service did not require its revenue agents to have a knowledge of legal skills or a law degree. Thus, petitioner could have maintained his position as a revenue agent and been promoted within that position without attending law school (Pet. App. A A-2 to A-3).

Pursuant to Treasury Regulations, Section 1.162-5(b)(3), the Commissioner of Internal Revenue disallowed petitioner's claimed deduction for law school expenses on the ground that they were incurred in order to qualify petitioner for the new trade or business of an attorney (Pet. App. A A-3). In this refund suit, the district court upheld the Commissioner's determination (Pet. 4-5; Pet. App. A A-1 to A-5; Pet. App. B B-1 to B-2), and ruled that Treasury Regulations, Section 1.162-5(b)(3) was a valid implementation of the statute (Pet. App. A A-5). The Ninth Circuit affirmed *per curiam* (Pet. 5; Pet. App. B B-1 to B-2).

1. Section 162(a) of the Code permits a deduction for the "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business." On the other hand, Sections 262 and 263 of the Code respectively deny deductions for personal expenses and for capital expenditures.

Section 1.162-5 of the Regulations, which governs the deductibility of education expenses, harmoizes these three statutes. It provides that the costs of education directed toward maintaining or improving job skills or toward meeting educational requirements imposed by an employer may be deducted. However, it bars the deduction of educational expenses that "qualify * * * [a taxpayer] in a new trade or business." Section 1.162-5(b)(3). Thus, the Regulation gives full effect to the policies inherent in Sections 162, 262 and 263 of the Code

by distinguishing those educational expenses that are "ordinary and necessary" expenses of a trade or business from those that are more closely related to a taxpayer's personal life or those that provide benefits over the indeterminate life of the new career the education made possible so as to constitute capital expenditures. *Weiszmann* v. *Commissioner*, 52 T.C. 1106, 1111, affirmed *per curiam*, 443 F.2d 29 (C.A. 9); *Bodley* v. *Commissioner*, 56 T.C. 1357, 1361; *Jungreis* v. *Commissioner*, 55 T.C. 581, 590-591.

Contrary to petitioner's argument (Pet. 6, 8-9), the 1967 amendments to the Regulations[2] were not a legislative usurpation by the Executive Branch. As this Court has observed, "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." *United States* v. *Correll*, 389 U.S. 299, 307; *Bingler* v. *Johnson*, 394 U.S. 741, 750-751. Here, the revised Regulation fully carried out the congressional policy of allowing ordinary and necessary expenses of a trade or business but disallowing the deduction of personal expenses or capital expenditures. *Weiszmann* v. *Commissioner*, *supra*, 52 T.C. at 1111; *Jungreis* v. *Commissioner*, *supra*, 55 T.C. at 590-591. Indeed, Section 1.162-5(b)(3) of the Regulations has been upheld as a proper implementation of the statute. *Weiszmann* v. *Commissioner*, *supra*; *O'Donnel* v. *Commissioner*, 62 T.C. 781, 783; *Weiler* v. *Commissioner*, 54 T.C. 398, 401-402.

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[2]Section 1.162-5 of the Regulations was originally promulgated in 1958. T.D. 6291, 1958-1 Cum. Bull. 63, 67. In 1967, the Regulation was amended by T.D. 6918, 1967-1 Cum. Bull. 36, 37-39.

Petitioner's major contention (Pet. 6, 8-9) is that the amended Regulation improperly denies a deduction for certain education expenses which might have qualified for deduction under the earlier Regulations. Under the old Regulation deductibility depended upon the taxpayer's "primary purpose" in furthering his education. If that "primary purpose" was to maintain or improve skills required in his employment, rather than to obtain a new position, to achieve a substantial advancement in position or to fulfill the taxpayer's general educational aspirations, the costs of education qualified for deduction. The 1967 amendment eliminated the "primary purpose" test and substituted an objective standard for determining whether the educational expense is deductible. *Carroll* v. *Commissioner*, 418 F.2d 91 (C.A. 7); *Weiler* v. *Commissioner, supra*, 54 T.C. at 401; *Bodley* v. *Commissioner, supra*, 56 T.C. at 1360.[3]

However, as this Court has repeatedly held, taxpayers have no vested rights in outstanding Regulations.[4] Instead, the Secretary of the Treasury may amend those pre-existing Regulations, as long as the amendments are consistent with the underlying legislation. See *American Chicle Co.* v. *United States*, 316 U.S. 450, 454-455; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90,

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[3]The cases upon which petitioner relies (Pet. 8-9) were decided under the "primary purpose" test of the earlier Regulations. See, *e.g.*, *Welsh* v. *United States*, 329 F.2d 145 (C.A. 6); *Williams* v. *United States*, 238 F. Supp. 351 (S.D.N.Y.); *Fortney* v. *Campbell*, 64-1 U.S.T.C. Par. 9489 (N.D. Texas); *Kilgannon* v. *Commissioner*, 24 T.C.M. 619; *Schultz* v. *Commissioner*, 23 T.C.M. 1372; and *Brennan* v. *Commissioner*, 22 T.C.M. 1222. Accordingly, they do not conflict with the decision below.

[4]Indeed, since petitioner did not begin his law studies until 1969, two years after the Regulation was amended, he cannot claim that he relied on the old Regulation to his detriment.

97, 100-101; *Morrissey* v. *Commissioner,* 296 U.S. 344, 354-355. "Experience, changing needs, changing philosophies inevitably produce constant change." *Helvering* v. *Wilshire Oil Co., supra,* 308 U.S. at 97. Indeed, it was the difficulty of applying the "primary purpose" test of the old Regulations that led to the promulgation of the amended Regulations here in issue. *Rombach* v. *United States,* 440 F.2d 1356, 1358 (Ct. Cl.).

Petitioner further contends (Pet. 9-10) that the Regulations favor those in the teaching profession, while discriminating against those who attend law school. Under the Regulations, the costs of education required of school teachers in order to maintain their teaching positions may be deductible even though the education obtained might qualify the teachers for employment as school principals or school guidance counselors. However, employment as a school principal or guidance counselor can be said to represent another aspect of a teacher's employment in the field of education rather than an entirely "new trade or business" (*Weiszmann* v. *Commissioner, supra,* 443 F.2d at 30).

Here, however, there was little, if any, connection between the law degree and general legal skills petitioner sought and his job as a field audit agent for the Internal Revenue Service (Pet. App. A-3). In the absence of any nexus between petitioner's business and the law school expenses here involved, they cannot be deducted as an ordinary and necessary business expense under Section 162.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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